IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
ROBERTO GRANA	:	NO. 98-338

ROBERTO GRANA	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 02-663

MEMORANDUM

Dalzell, J. September 17, 2002

Because Roberto Grana's motion under 28 U.S.C. § 2255 involves two questions of some complexity, we address them here at some length.

I. Background

During the course of a grand jury investigation into Medicare fraud involving MKM Nursing Home Specialties ("MKM"), a Philadelphia-area medical supply firm, the Government discovered that Dr. Roberto Grana had referred business to MKM sales representatives Manuel and Jaime Gotay in exchange for kickbacks. In August 1997, Manuel Gotay recorded two conversations with Grana in which Grana urged Gotay to lie to the grand jury. On March 15, 2000, a jury found Grana guilty of one count of obstruction of justice under 18 U.S.C. § 1512(b)(1). On July 21, 2000, we sentenced Grana to 18 months imprisonment, two years of supervised release, and a fine of $5,000.00.

Grana’s sentence reflected two aspects that increased his sentence. First, we assigned two criminal history points,

resulting in Grana's placement in Criminal History Category II, because in 1988 a federal district court in Puerto Rico had sentenced him to one year imprisonment, with nine months suspended, after his conviction for mail fraud. Second, we granted the Government's request for a two-point enhancement under U.S.S.G. § 3C1.1 because we found that Grana engaged in further obstruction of justice by giving false testimony during the trial. We subsequently denied Grana's motions for a new trial based on newly discovered evidence and for reconsideration of that denial.[1]

Grana filed two appeals. The first appeal (No. 00-2206) challenged our imposition of a two-level increase for further obstruction of justice. The second appeal (No. 01-1375) focused on the newly discovered evidence and argued that (1) we erred by denying his motion for a new trial; (2) in light of the newly discovered evidence, we committed plain error by not instructing the jury on the effect that Gotay's payments to Grana should have had on its determination of whether Grana had violated 18 U.S.C. § 1512(b)(1); and (3) the case should be remanded for resentencing because the newly discovered evidence cast doubt on our two-level increase for further obstruction of justice. On November 14, 2001, the Court of Appeals affirmed

[1] The newly discovered evidence was an affidavit in which Manuel Gotay contradicted his testimony at Grana's trial by stating that he had not paid kickbacks to doctors. We denied Grana's motion on the grounds that the affidavit was not material and would not likely produce an acquittal at a retrial. Order of Feb. 2, 2001, at 2.

Grana's conviction and sentence in an opinion rejecting all arguments raised in both appeals. See United States v. Roberto Grana, Nos. 00-2206, 01-1375 (3d Cir. Nov. 14, 2001) (Mem. Op.).

As noted, Grana has now filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. His claims fall into two categories. The first includes three claims relating to the introduction of evidence at trial and our calculation of his sentence, none of which he raised on direct appeal. The second involves seven claims of ineffective assistance of counsel. For the reasons provided below, we deny all of Grana's claims.

II. Discussion

A. Claims Relating to the Introduction of Evidence and Sentencing

1. Introduction of evidence relating to the kickback arrangement

Grana claims that we erroneously allowed the Government to introduce Manuel Gotay's testimony that he gave Grana kickbacks for ordering and prescribing unnecessary medical supplies from MKM. Grana appears to argue that Gotay's kickback evidence should not have been admitted under Fed. R. Evid. 404(b) because he "was not charged with healthcare fraud and/or any substantive crime relating to the receipt of alleged kickbacks." Deft.'s § 2255 Motion, at 4e. He further contends that if the kickback evidence was admissible, a limiting instruction was necessary under Rule 404(b).

Grana's trial counsel failed to object to the introduction of the kickback testimony or seek a limiting instruction. He has therefore waived these claims unless he can satisfy the "cause and prejudice" standard of United States v. Frady, 456 U.S. 152 (1982). As will be seen, even if Grana could establish "cause" for his procedural default, he cannot establish "prejudice."

Grana suffered no prejudice because Rule 404(b) did not govern the admissibility of the kickback evidence. Evidence that is "'intrinsic' to the charged offense" does not implicate Rule 404(b). See F. R. Evid. 404(b) (Advisory Committee Note). Evidence is "intrinsic" if it is "inextricably intertwined with the charged crime such that a witness' testimony would have been confusing and incomplete without mention of the prior act." United States v. Record, 873 F.2d 1363, 1372 n.5 (10th Cir. 1989) (quotations omitted); see also United States v. Ramos, 971 F.Supp. 186, 192 (E.D. Pa. 1997) (evidence is intrinsic if necessary "to complete a coherent story of the crime charged").

Here, the Government needed the kickback testimony to place the evidence concerning Grana's obstruction of justice in its proper context. In the taped conversations, Grana referred to the kickbacks as "transactions" and an "arrangement," both of which are veiled, ambiguous terms. See, e.g., Gov't Exhibit 6, at 6. Without Gotay's testimony on the kickbacks, the jury would have found the tape recordings and Gotay's other testimony to be confusing and incomplete.

Moreover, Grana could not establish prejudice even if Gotay's kickback testimony implicates Rule 404(b). Evidence of other crimes or acts is admissible under Rule 404(b) if (1) it serves a proper evidentiary purpose, such as proof of motive; (2) it is relevant under Fed. R. Evid. 402; (3) its probative value outweighs its prejudicial effect under Fed. R. Evid. 403; and (4) the court provides a limiting instruction concerning the purpose for which it may be used. United States v. Mastrangelo, 172 F.3d 288, 294-95 (3d Cir. 1999) (citing Huddleston v. United States, 485 U.S. 681, 691-92 (1988)). The prosecution in a criminal case must provide "reasonable notice" of the "general nature" of any such evidence it intends to introduce at trial. Rule 404(b).

The introduction of kickback evidence at Grana's trial satisfied these requirements. The Superseding Indictment, which expressly referred to the kickback scheme, provided Grana with reasonable notice of the Government's intent to introduce kickback evidence at trial. See Superseding Indictment, at 2. The kickback evidence served a proper evidentiary purpose because it illuminated Grana's motive in encouraging Gotay to lie to the grand jury, and it thus palpably satisfied the relevance requirement of Rule 402. Given the kickback evidence's centrality to the Government's case and the vagueness of Grana's references to his "arrangement" with Gotay in the recorded conversations, its probative value outweighed any unfair prejudicial effect. Finally, we provided a limiting instruction when we charged:

> You are to determine the guilt or innocence of the defendant only as to the specific charge brought against him by the Government. This charge is the only charge before you for consideration. The defendant is not on trial for any conduct not charged as a crime in the Superceding [sic] Indictment.

Tr. of Mar. 15, 2000, at 306.

In a case concerning an almost-identical jury charge, our Court of Appeals held that "by no stretch of the imagination" could such a limiting instruction rise to the level of plain error in the Rule 404(b) context. United States v. Gibbs, 190 F.3d 188, 218 n.21 (3d Cir. 1999).

The kickback testimony was thus admissible even under the assumed applicability of Rule 404(b), and Grana received all the procedural protection he was due under Huddleston and the express terms of the Rule.

2. Claims relating to Grana's sentencing

Grana raises two new sentencing claims. First, he argues that we erroneously determined that he had two criminal history points, resulting in his placement in Criminal History Category II. Second, he contends that in considering whether to enhance his sentence for further obstruction of justice, we failed to apply a clear and convincing standard.

Grana did not raise these issues on direct appeal, and he has waived them unless he establishes both cause for his procedural default and prejudice resulting from it. United States v. Mannino, 212 F.3d 835, 839-40 (3d Cir. 1999); United States v. Essig, 10 F.3d 968, 977 (3d Cir. 1993). Even if Grana

could establish cause, he cannot prove that he suffered prejudice because his analysis of our application of the Guidelines errs.

(a) Grana's Criminal History Category

Upon Grana's conviction for mail fraud in 1987, Judge Juan M. Perez-Gimenez sentenced Grana to one year's imprisonment, with nine months suspended and three months to be served "in an appropriate institution." Gov't Exhibit B. Grana served his sentence in a halfway house. Pursuant to U.S.S.G. § 4A1.1(b) and Ch. 5 Pt. A, we assigned two criminal history points and placed Grana in Criminal History Category II. See Judgment, at 6.

Grana now argues that our assignment of two points was erroneous because Judge Perez-Gimenez had sentenced him to serve the three months in a halfway house. In making this claim, Grana relies on the revised Presentence Investigation Report, dated July 12, 2000, which states that "the Judge ordered that he be placed at a halfway house for three months." Presentence Investigation Report, at 5.

A sentence to a halfway house is indeed not a "sentence of imprisonment" leading to the assignment of two or three points under § 4A1.1(a) or (b); instead, the Guidelines instruct us to assign one point under § 4A1.1(c). See U.S.S.G. § 4A1.1 (Background) (distinguishing between "confinement sentences" and halfway house sentences). However, Grana cannot avail himself of the Guidelines' more lenient treatment of halfway house sentences because Judge Perez-Gimenez did not, in fact, sentence him to the halfway house.

The 1987 Judgment Order states only that Grana was to serve three months in an "appropriate institution." We determined Grana's criminal history by reference to the actual text of Judge Perez-Gimenez's written judgment rather than to the nature of the facility where the Bureau of Prisons ultimately chose to place Grana. This approach has many advantages. By confining ourselves to the express language of the sentencing court's judgment, we ensure that Grana's Guideline range reflects his "record of prior criminal behavior," U.S.S.G. Ch. 4, Pt. A, Introductory Commentary, rather than "the vagaries of the executive branch's implementation of his sentence." United States v. Urbizu, 4 F.3d 636, 639 (8th Cir. 1993). In addition, we promote judicial efficiency and diminish the need for additional factfinding by relying on the sentencing court's written judgment. Id. Finally, by relying exclusively on the written judgment, we best comply with the Guidelines' definition of the term "prior sentence" as "any sentence previously imposed upon adjudication of guilt," U.S.S.G. § 4A1.2(a)(1), a definition that focuses on the sentence the court formally pronounced rather than the sentence actually served.

We therefore need not resolve the discrepancy between the Presentence Investigation Report and the 1987 Judgment Order.

(b) Two-point enhancement for further obstruction

On appeal, Grana argued that his two-point sentencing enhancement for further obstruction of justice was improper

because we did not find that his trial testimony implicated a "material matter." Appellant's Br. (No. 00-2206), at 21-23. After a thorough review of the record, the Court of Appeals rejected this claim. Mem. Op. at 6-8.

Grana now claims that we applied a preponderance standard to the evidence of his further obstruction rather than the clear and convincing standard required under the version of § 3C1.1 in effect when he committed his underlying offense. See United States v. Arnold, 106 F.3d 37, 44 (3d Cir. 1997) (holding that the sentencing court may not impose the enhancement "unless, in weighing the evidence, it is clearly convinced that it is more likely than not that the defendant has been untruthful"). His sole support for this claim is the following statement from the sentencing hearing:

> And, so, with some reluctance -- because I rarely do this -- with some reluctance, I think that we do have the further obstruction under Section 3C1.1.

Tr. of Jul. 21, 2000, at 6 (emphasis added).

It is clear from the context that our expression of "reluctance" stemmed from the infrequency with which we make a finding of further obstruction -- and not from any doubt about its applicability in Grana's case. We certainly entertained no doubt then, and we entertain none now. Grana's claim that we applied the wrong standard is therefore meritless.

B. Ineffective Assistance of Counsel

Grana raises no less than seven claims of ineffective assistance of trial and appellate counsel. To prevail, Grana

must first show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). We evaluate counsel's conduct with deference, making every effort "to eliminate the distorting effects of hindsight." Id. at 689. Moreover, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Second, Grana must show that his counsel's deficient performance resulted in prejudice, which the Supreme Court has defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. We consider each of Grana's claims in turn.

1. Decision to elicit testimony concerning prior conviction

Grana contends that trial counsel was ineffective for eliciting his testimony concerning the 1987 mail fraud conviction. Tr. of Mar. 14, 2000, at 212. Grana thereby lost the right to appeal the admissibility of his prior conviction because, two months after trial, the Supreme Court held that a criminal defendant who preemptively introduces evidence of a prior conviction cannot challenge its admissibility on appeal. Ohler v. United States, 529 U.S. 753, 760 (May 22, 2000).

At the time of the trial, defense attorneys frequently elicited prior convictions on direct examination, and there was a split of authority on whether this practice waived the

defendant's right to appeal its admissibility. Compare United States v. Fisher, 106 F.3d 622, 630 (5th Cir. 1997), with United States v. Williams, 939 F.2d 721, 723-25 (9th Cir. 1991). Our Court of Appeals had declined to take a position on this issue. See United States v. Jacobs, 44 F.3d 1219, 1224 n.5 (3d Cir. 1995). Given the fact that it was highly likely the Government would introduce evidence of the prior conviction if Grana took the stand, see Order of March 14, 2000 (denying motion in limine to exclude prior felony conviction), and given the unclear state of the law in this Circuit at the time of trial, we can hardly say that counsel's strategic decision was "outside the wide range of professionally competent assistance" the Constitution guarantees. Strickland, 466 U.S. at 690. Moreover, trial counsel was not ineffective for failing to anticipate how Ohler would resolve the circuit split. See Sistrunk v. Vaughn, 96 F.3d 666, 670-71 (3d Cir. 1996); United States v. Foster, No. 98-127, 1999 WL 615630, at * 3 (E.D. Pa. Aug. 12, 1999) (Shapiro, J.) ("An attorney has not rendered ineffective assistance for failing to anticipate a possible change in the law.").

2. Failure to object to introduction of kickback evidence or seek limiting instruction

Grana next claims that trial counsel was ineffective for failing to object to the Government's introduction of kickback evidence under Rule 404(b); in the alternative, he argues that to the extent such evidence was admissible under Rule 404(b), trial counsel should have sought an appropriate limiting

instruction.

We need not determine whether Grana has satisfied the "cause" prong of Strickland because he has not demonstrated prejudice. For the reasons detailed above, the kickback testimony did not implicate Rule 404(b) because it was intrinsic to the charged offense. Even if Rule 404(b) governed the admissibility of this evidence, Grana cannot show prejudice because, as explained above, we did provide an appropriate limiting instruction.

3. Decision to focus on whether Grana received kickbacks and failure to advise a nontrial disposition

Grana claims that trial counsel was ineffective for staking his defense on whether Gotay's payments were kickbacks or loan repayments. He argues that this strategic choice reflected "unsound legal theory" because the characterization of Grana and Gotay's financial arrangement was not material to the obstruction of justice charge. Deft's § 2255 Motion, at 4e.

However, Grana himself concedes that the jury's characterization of those payments could have altered the outcome of his trial when he suggests, in another part of his § 2255 petition, that "if the jury believed the payments to be something other than kickbacks, movant's efforts at influencing Gotay could not be corrupt" within the meaning of 18 U.S.C. § 1512(b)(1). Deft's § 2255 Motion, at 4g. The Court of Appeals similarly observed that "[i]f the jury believed Grana's explanation that the money received from Gotay was repayment of a loan and not a

kickback, it could have acquitted him." Mem, Op. at 8. We cannot conclude that a strategic decision that might have resulted in an acquittal fell below the standard of professional competence that the Constitution mandates.

Grana further argues that his counsel was ineffective for failing to recognize the risk of proceeding to trial and recommend a non-trial disposition of the case. Grana's petition is studiously vague about the extent to which trial counsel discussed his pleading options.[2] Even if Grana could show that he received inadequate advice on this question, he must demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, he would have pleaded guilty. Johnson v. Duckworth, 793 F.2d 898, 902 n.3 (7th Cir. 1986). But nothing in Grana's Petition suggests that he ever contemplated a guilty plea.

4. Failure to seek a jury charge better tailored to the facts and defense theory

Grana argues that trial counsel was ineffective for failing to seek a jury instruction concerning the characterization of the payments between Gotay and Grana. The Court of Appeals held that the jury instructions in this case were proper. Mem. Op. at 6. Grana seeks to overcome this

[2] The petition Delphically states that "to the extent that trial counsel discussed non-trial dispositions of the case with movant, trial counsel could not have properly advised movant of the perils of proceeding to trial since trial counsel obviously did not appreciate such peril." Deft's § 2555 Motion, at 4f.

obstacle by arguing that the Court of Appeals considered the jury instructions in the context of plain error analysis rather than in the context of his ineffective assistance claim. However, the plain error standard is less stringent than the § 2255 standard of review. Frady, 456 U.S. at 166. Because the Court of Appeals upheld the jury instruction on direct appeal, and did so by applying a less restrictive standard of review, Grana cannot demonstrate that he was prejudiced by trial counsel's failure to seek a different instruction.

5. Failure to investigate properly the facts of the case

Grana next contends that trial counsel was ineffective for failing to discover Gotay's affidavit before trial. Even if Grana could show that counsel was inept in failing to uncover the affidavit, he cannot demonstrate prejudice. Both this Court and the Court of Appeals have held that Gotay's affidavit was cumulative impeachment evidence. Mem. Op. at 5; Order of Feb. 21, 2001, at 2-3. Further, we have already held that "under the circumstances of the evidence adduced at this trial, [the affidavit] would not likely produce an acquittal at a retrial." Order of Feb. 2, 2001, at 2. Given these findings, Grana cannot show a reasonable probability that, but for counsel's conduct, the result of the trial would have differed. Strickland, 466 U.S. at 694.

6. Failure to object to criminal history classification and evidentiary standard for sentencing enhancement

Grana argues that counsel was ineffective for failing to challenge, either at the sentencing hearing or on appeal, his placement in Criminal History Category II and the standard under which we considered the evidence of his further obstruction of justice. Because his analysis of our application of the Sentencing Guidelines is incorrect for the reasons provided above, he cannot show prejudice under Strickland.

7. Ineffective assistance of appellate counsel

Grana makes a cursory and generic claim of ineffective assistance of counsel for failure to raise claims on appeal. There is no reason to conclude that Grana's appellate counsel fell below the standard of professional competence required under Strickland in selecting issues to raise on direct appeal, particularly since none of the new claims he has raised in this Petition have any merit. See Sistrunk, 96 F.3d at 671 (appellate counsel's decision not to raise "doomed" claims reflected "an informed judgment call that was counsel's to make").

In any event, Grana cannot show prejudice. As our analysis of each new claim shows, Grana cannot demonstrate a reasonable probability that, but for appellate counsel's strategic choices, the result of his direct appeal would have differed. Strickland, 466 U.S. at 694.

III. Conclusion

An evidentiary hearing is not necessary because Grana's petition raises no issue of material fact, Essig, 10 F.3d at 976, and "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255.

For the reasons stated above, we deny all of Grana's claims. Because Grana has not made a substantial showing of any violation of his constitutional rights, we will not issue a certificate of appealability. See 28 U.S.C. § 2253.

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ORDER

AND NOW, this 17th day of September, 2002, upon consideration of the petition of Roberto Grana to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and the response thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. The § 2255 petition is DENIED;

2. The petitioner having failed to make a substantial showing of the denial of a constitutional right, we decline to issue a certificate of appealability, see 28 U.S.C. § 2253; and

3. The Clerk shall CLOSE this case statistically.

BY THE COURT:

_____

Stewart Dalzell, J.